

# In the Court of Appeals of the State of Alaska

**Danny J. Nickolai,**  
Appellant,

v.

**State of Alaska,**  
Appellee.

Court of Appeals No. **A-13796**

## **Order**

Date of Order: **February 11, 2021**

Trial Court Case No. **3AN-12-11886CI**

Danny Nickolai has filed a motion requesting this Court accept his late-filed appeal based on the ineffective assistance of his trial counsel, Elizabeth Fleming. Nickolai’s application for post-conviction relief was dismissed July 5, 2018; therefore, his notice of appeal was due on August 6, 2018. Nickolai, however, did not file his notice of appeal until January 28, 2021 — nearly two and a half years late.

His current attorney, Brooke Berens, asks this Court to accept Nickolai’s late-filed appeal due to Ms. Fleming’s ineffective assistance. In the alternative, Ms. Berens asks this Court to remand the matter to the superior court for a bifurcated post-conviction relief application, as the Court has done in other cases.<sup>1</sup> The State opposes the request that this Court accept the late-filed appeal, but does not oppose remanding the matter to the superior court for a bifurcated post-conviction relief application.

Alaska Appellate Rule 521 authorizes an appellate court to relax or dispense with a rule of appellate procedure — such as a filing deadline — if strict adherence to the deadline will work an injustice. But Appellate Rule 521 also declares that, “in a matter involving the validity of a criminal conviction or sentence,” the rule “does not authorize an appellate court . . . to allow the notice of appeal to be filed more

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<sup>1</sup> See *Cleveland v. State/Akeya v. State*, File Nos. A-13181/A-13182 (procedure approved by Alaska Supreme Court order dated November 5, 2019 in *Cleveland v. State/Akeya v. State*, File Nos. S-17561/S-17522); see also *Dorsey v. State*, File No. A-13521.

than 60 days late.” *See also* Appellate Rule 502(b).

This Court has recognized that this rule cannot be applied to deny a defendant the right to pursue an appeal when the failure to timely file the notice of appeal is due to attorney neglect. Accordingly, this Court has accepted late notices of appeal, even those filed more than 60 days late, when the uncontested facts demonstrated that the delay was caused by ineffective assistance of counsel. *See, e.g., Belluomini v. State*, File No. A-13306 (Order dated Nov. 26, 2018); *Nyako v. State*, File No. A-13157 (Order dated July 16, 2018); *Backford v. State*, File No. A-12995 (Order dated Nov. 22, 2017); *Hoehne v. State*, File No. A-12815 (Order dated Mar. 16, 2017); *Stacy v. State*, File No. A-12668 (Order dated Nov. 1, 2016); *Custer v. State*, File No. A-11901 (Order dated Mar. 28, 2014).

In this case, however, Nickolai’s pleadings do not set forth a *prima facie* case of ineffective assistance of counsel. The Court therefore follows the procedure adopted in *Cleveland v. State*, A-13181, and *Akeya v. State*, A-13182, for converting the motion to accept late-filed appeal to a post-conviction relief application.

Accordingly, **IT IS ORDERED:**

1. Referral to the Superior Court. This case is remanded to the superior court with directions to convert the motion to accept late-filed appeal into an application for post-conviction relief. Because Nickolai seeks to appeal the order dismissing his first post-conviction relief application, Nickolai’s new post-conviction relief application is governed by *Grinols v. State*, 10 P.3d 600 (Alaska App. 2000), *aff’d*, 74 P.3d 889 (Alaska 2003) (permitting a criminal defendant to file a second post-conviction relief application challenging the effectiveness of his attorney in his first post-conviction relief application).

The Court directs the Appellate Clerk’s Office to transmit a copy of the file in this case to the superior court. At Nickolai's request, the superior court shall bifurcate the attorney neglect issue (*i.e.*, whether attorney neglect resulted in the late-filed appeal) from any other post-conviction relief issues that Nickolai may wish to pursue in a *Grinols* application, and the court shall stay litigation on the remaining claims. The superior court shall expedite action on the attorney neglect claim related to the late-filed appeal.<sup>2</sup>

2. Additional guidance. Because this application for post-conviction relief needs to be litigated and resolved on an expedited basis, the Court provides the following additional guidance to the superior court.

Under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), it is *per se* ineffective assistance of counsel for an attorney to fail to meet the filing deadline for a direct appeal if the defendant timely requested an appeal. Because filing a notice of appeal is a “purely ministerial task,” a defendant who instructs counsel to initiate an appeal “reasonably relies upon counsel to file the necessary notice.” *Id.* at 477. The remedy for this *per se* ineffective assistance of counsel is to reinstate the appeal. *Id.* at 484; *see also Broeckel v. State*, 900 P.2d 1205, 1208 (Alaska App. 1995).

In *Wassilie v. State*, 331 P.3d 1285 (Alaska App. 2014), this Court extended this duty — *i.e.*, the obligation to preserve a defendant’s right to appeal — to attorneys who represent a defendant in a post-conviction relief application in the trial court and

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<sup>2</sup> We recognize that action on this expedited claim may be impacted by current court orders prioritizing and suspending certain hearings in response to the COVID-19 pandemic. *See, e.g.*, Special Order of the Chief Justice, Order No. 8131 (March 19, 2020); Presiding Judge Statewide Administrative Order Governing Relaxation and Suspension of Various Court Rules Based on the COVID-19 Pandemic (March 23, 2020). We encourage the parties to confer telephonically or by email to resolve this matter as expeditiously as possible.

ultimately file a certificate of no arguable merit as to the defendant's claims. *See id.* at 1289. Thus, an attorney who is permitted to withdraw after filing a no-merit certificate in a post-conviction relief case "still owes certain final duties to the defendant: the obligation to ascertain whether the defendant wishes to appeal [the court's dismissal of his application for post-conviction relief] and, if so, the obligation to initiate appellate proceedings." *Id.* at 1290.

Additionally, under AS 12.72.020(a)(3)(A), a criminal defendant who does not file a direct appeal has eighteen months after entry of the judgment of conviction to file a post conviction relief application. The superior court may need to address this issue in Nickolai's case.

This Court has previously recognized that due process and fundamental fairness may, under certain circumstances, require relaxation of the post-conviction relief statutory deadline.

Under federal law, a defendant is entitled to equitable tolling if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The egregious misconduct of an attorney can qualify as "extraordinary circumstances." *Id.* at 652-54. The diligence required for equitable tolling purposes is "reasonable diligence," not "maximum feasible diligence." *Id.* at 653 (quoting *Starns v. Andrews*, 524 F.3d 612, 618 (5th Cir. 2008)).

3. Judicial notice. We take judicial notice that filing a timely notice of appeal in the Alaska Court of Appeals is a simple matter. The superior court may similarly take judicial notice of this fact. Although an appellate attorney must ultimately

file a designation of transcript and a notice of points on appeal, those documents are not required to initiate the appellate process and ensure a timely notice of appeal. Instead, a party may lodge an appeal by filing a docketing statement along with a copy of the judgment, and may seek an extension to file the remaining documents. *See* Alaska R. App. P. 204(b). (Indeed, even after filing the notice of points on appeal, the attorney may later amend the points through what is generally considered a *pro forma* motion.) The appeal is deemed to be filed on the date on which it is first docketed.

The superior court should be aware that, given the length of briefing delays and this Court's own backlog, it is not unusual for a criminal appeal to take more than two years to resolve. It is also not unusual for the first substantive brief in an appeal — the appellant's brief — to be filed well over a year after the notice of appeal was docketed.<sup>3</sup>

3. Conclusion. Because the Court is remanding Nickolai's case with directions to convert his motion into a post-conviction relief application, we direct the Appellate Clerk's Office to close this file. If the superior court grants relief to Nickolai, he may move to reopen this appeal, or file the necessary paperwork to initiate a new appeal.

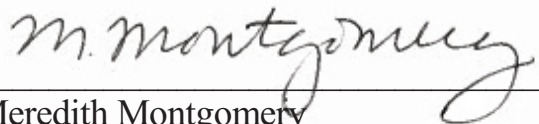
Entered at the direction of Chief Judge Allard.

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<sup>3</sup> Even before the first due date for the appellant's opening brief, the record and transcript must be prepared — a process that takes up to 40 days. *See* Alaska R. App. P. 210(e)(1). Once the record is certified, the appellant then generally has 30 days to file the opening brief. *See* Alaska R. App. P. 212(a)(1)(A). At that point, the appellant may request an extension, and this extension limit (390 days for the appellant's opening brief) is governed by Standing Order No. 12.

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Clerk of the Appellate Courts



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Meredith Montgomery

cc: Judge Marston  
Trial Court Clerk - Anchorage

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